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**GENERIC PROCEEDING TO DETERMINE
WHETHER CERTAIN WATER PROVIDERS
ARE SUBJECT TO REGULATION
BY THE COMMISSION**

DOCKET 33192

ORDER

BY THE COMMISSION:

Through consumer complaints and independent research, the Commission identified several water service providers that potentially meet the statutory definition of "utility," subjecting them to Commission regulation. To determine whether these and other similar water service providers are subject to regulation, on December 14, 2021, the Commission initiated this generic proceeding. The order initiating this proceeding asked the subject entities to address several legal issues as well as provide documents related to their organization and operations. To obtain this information, this generic proceeding included a public comment period, with initial comments due on or before the close of business on February 11, 2022 and reply comments due on or before the close of business on February 25, 2022. The Commission received seven sets of comments, six from water service providers and one from the Alabama Rural Water Association ("ARWA").

The following sections: 1) discuss the background for this proceeding; 2) summarize the public comments on the legal issues; 3) provide analysis and findings regarding the legal issues; 4) give an overview of the submitted organizational documents; and 5) issue findings regarding the status of identified water providers that provided sufficient information to determine jurisdiction.

I. Background

The Commission identified the following unregulated water providers that potentially meet the statutory definition of “utility,” subjecting them to Commission regulation.

Bethel Water System, Inc.

Blue Hole Water Company, Inc.

Ford’s Valley and Highway 278 Water Cooperative

Freemanville Water System, Inc.

McCall Water System, Inc.

Mexia Water System, Inc.

Peterson Water System, Inc.

Supreme Property Management, Inc.

VAW Water Systems, Inc.

White House Water System¹

Commission Staff performed an initial assessment of the identified providers, reviewing available corporate governance documents and talking with representatives of the water providers. During this initial assessment, representatives of some of these water providers claimed to not fall under the Commission’s authority based on their corporate form or the nature of their operations. Others asserted exemptions from Commission regulation. This proceeding aims to consider the scope of the Commission’s authority and the asserted exemptions to clarify the Commission’s jurisdiction over certain types of water providers.

Many of the above-listed water service providers were formed as nonprofit entities. Their formation documents recite the following purpose or something similar: “to associate its members for their mutual benefit through cooperation but not for pecuniary profits, in the sense of paying interest or dividends, and to that end to construct, maintain and operate a water system for the supplying of water... to its members.”² The formation documents for several of these entities indicate that the entities were formed in accordance with “the terms and provisions of Title 10,

¹ The Commission may find other currently unregulated water providers following this proceeding and apply the findings from this proceeding to them.

² For all the water providers that submitted comments, their articles provided similar language.

Section 168 of the Code of Alabama, Recompiled 1958.”³ This section, which provides for the incorporation of mutual economic associations “for mutual benefit through the application of cooperation, single-tax, or other economic principles,”⁴ was re-codified as Ala. Code § 10A-20-9.01. Neither this section nor the other sections related to mutual economic associations (together “Article 9”) exempt such entities from regulation by the Commission.

For the identified water providers that were not formed as nonprofit entities, prior to this proceeding their representatives suggested other reasons for exemption from Commission regulation. Those asserted reasons include: 1) that the water provider only charges its retail customers the same rates as its wholesale water provider, with minor administrative markups; 2) that the water provider only provides service to a limited area, such as a single development or subdivision; and 3) that the water provider believes that the Commission had previously acknowledged an exemption from regulation.⁵

II. Legal Issues and Comments

The Commission regulates utilities as defined by Ala. Code § 37-4-1. Therefore, the starting point for consideration of whether an entity is subject to Commission regulation is the statutory definition of “utility.” Under Ala. Code § 37-4-1, the term “utility,” relevant to water service, is defined as “every person, not engaged solely in interstate business, that now or may

³ For all the water providers that submitted comments, their articles reference this code section.

⁴ In the order initiating this proceeding, the Commission referred to these entities as “single tax corporations” based on a term used in that code section. Some of the commenters appeared to object to this label. *See* VAW Comments, page 7. The Commission’s use of the term “single tax corporation” in the previous order was not meant to imply that the identified water providers apply single-tax principles. For clarity, in this order, the Commission will refer to corporations formed under this section as “Mutual Economic Associations,” another term used in the Alabama Code to describe such entities.

⁵ Without entertaining whether the Commission previously acknowledged any exemption, the Commission may consider jurisdiction over an entity at any time. The Commission is not estopped from jurisdiction based on a prior determination. Further, over time, facts and laws change that may bring a previously unregulated entity under the Commission’s authority. Therefore, this basis for an exemption from Commission jurisdiction is not explored any further in this order.

hereafter own, operate, lease, or control... [a]ny plant, property, or facility for the supply, storage, distribution, or furnishing to or for the public of water for manufacturing, municipal, domestic, or other uses.” Examining the definition of “utility,” the Alabama Supreme Court has discussed, at length, the phrase “to or for the public” which is part of the definition.⁶ In *Coastal States*, the Court examined this phrase in Alabama law, as well as the laws in other jurisdictions, and found that an important distinction of a utility is that it holds itself out as providing service to every person in the public who requires service.⁷

Title 37, which describes the Commission’s authority over utilities and the scope of its regulation, provides that certain types of entities or operations are exempt from regulation. The following is a list of some of these exemptions:

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|---------------------|--|
| Ala. Code § 37-1-33 | Furnishing of water for the sole use of the producer of the water |
| Ala. Code § 37-1-33 | Supplying of water to a utility (wholesale) |
| Ala. Code § 37-1-34 | Municipal water utilities |
| Ala. Code § 37-6-27 | Cooperatives formed pursuant to Chapter 37-6 providing water service |

In addition to the exemptions in Title 37, there are also numerous exemptions in Title 11 for water systems operated by governmental or quasi-governmental entities (*See, e.g.*, Ala. Code §§ 11-50-241; 11-50-323; and 11-88-21).

Notwithstanding the above list of specific exemptions, there is no general exemption in Title 37, or elsewhere in the Alabama Code to the knowledge of this Commission, for entities formed for nonprofit purposes. Many of the water providers identified by the Commission were

⁶ *Coastal States Gas Transmission Co. v. Alabama Pub. Serv. Comm’n*, 524 So. 2d 357, 358 (Ala. 1988) (stating that “[a]t bottom,” the determination of the Commission’s jurisdiction is a question about the interpretation of the phrase “to or for the public”).

⁷ 524 So. 2d 357, 361 (Ala. 1988). *Coastal States* addressed the Commission’s asserted authority over an entity that was providing natural gas to industrial customers in the state. The Alabama Supreme Court held that Coastal States was not a public utility because it only sold natural gas to select industrial customers rather than making service available to the general public.

formed for nonprofit purposes pursuant to Ala. Code § 10A-20-9.01. The nonprofit purposes of these entities, along with other recitations in their corporate governance documents, echo some of the characteristics of cooperatives, which are exempt from Commission regulation. However, unlike Title 37 cooperatives, there is no explicit exemption from Commission regulation for these mutual economic associations.

Given the breadth of the relevant law (spanning several Alabama Code Titles and the related caselaw) and the stated positions of several of the identified water providers, the Commission sought comments on four legal issues. Most of the received comments focus on the Commission's first question—whether a water provider that only serves its own members is providing service to the general public. Many commenters indicate that the other three legal questions posed by the Commission do not apply to them. The following paragraphs summarize the comments received on each of those issues.

1. Summary of comments regarding whether a water provider that only serves its own members is providing service to the general public.

Several water providers and the ARWA commented on the issue of whether a water provider that only serves its own members may be a public utility under Alabama law. In addition to addressing *Coastal States*,⁸ which the Commission referenced above and in the order initiating this proceeding, the comments include references to two other Alabama court cases, a prior Commission order, and Alabama statutory law. Generally, the commenters assert that water providers that only serve their own members, as reflected in their corporate governance documents and operations, are not public utilities subject to Commission regulation.

⁸ 524 So. 2d 357 (Ala. 1988).

Bethel Water System, Inc. (“Bethel”) asserts that a “members only” water provider is not a public utility under Alabama law.⁹ To support this assertion, Bethel references *City of Millbrook v. Tri-Community Water System* (“*City of Millbrook*”), emphasizing that such entities associate their members together for mutual benefit through cooperation rather than for profit.¹⁰ Bethel notes that the Commission had previously decided a similar issue, finding that a water company that only served its own members was not a public utility.¹¹

Ford’s Valley and Highway 278 Water Cooperative (“Ford’s Valley”) also references *City of Millbrook* to support its assertion that water providers serving only their own members do not fall under the Commission’s jurisdiction.¹² Ford’s Valley notes that the Court found the water provider was not a public utility because “it was only supplying water to its own constituent members and not to the public at large.”¹³ Ford’s Valley also points to the Court’s recognition of language in the corporate governance documents, noting that the water provider was constituted for a purpose “to construct, maintain and operate a water system for the supplying of water ... to its members” and “for their mutual benefit through cooperation, but not for pecuniary profit.”¹⁴ Ford’s Valley also recognizes the Court’s consideration of whether a water provider holds itself out as willing to serve the public as an indicator of meeting the criteria for a public utility.¹⁵

⁹ Bethel Comments, page 4.

¹⁰ *Id.* (citing 692 So.2d 866 (Ala. Civ. App. 1997)). In *City of Millbrook*, the Tri-Community Water System argued that it was not a public utility because it only provided water to its own constituent members rather than the general public. The Alabama Supreme Court agreed.

¹¹ *Id.* (referencing *Alabama Public Service Commission v. Mays Bend Water Cooperative, Inc.*, 1990 WL 10091990 (Ala. P.S.C. July 11, 1990)). *Mays Bend* involved a cooperative that provided water to its own members. Applying *Coastal States*, the Commission found that Mays Bend Water Cooperative, Inc. was not a utility.

¹² Ford’s Valley Comments, page 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

McCall Water System, Inc. (“McCall”) also argues that water providers that only serve their own members who share the cost of operation are not public utilities.¹⁶ McCall adds that an essential element of a public utility is that it holds itself out as willing to provide water to the public at large.¹⁷

VAW Water Systems, Inc. (“VAW”) asserts that when water service “can only be obtained permissively,” such as through membership, then the providing entity is not a public utility.¹⁸ VAW claims that the “[*City of Millbrook*] decision is dispositive of the question posed by the Commission.”¹⁹ VAW also notes the importance of the “chartered purpose” of an entity in determining whether it meets the definition of a public utility pursuant to Alabama law.²⁰

The ARWA asserts that “a water provider that was constituted to serve only its own members is not a public utility subject to regulation by the Commission.”²¹ The ARWA references *City of Millbrook* where the Court found that a water provider was not a utility based on the state purpose in organizing charter.²² ARWA also references *Alabama Power Co. v. Cullman County Electric Membership Corp.*²³ to support its contention that certain water providers do not fall under the Commission’s jurisdiction, citing the eight factors the Court used to evaluate whether an electric cooperative was a public utility.

¹⁶ McCall Comments, page 8.

¹⁷ *Id.*

¹⁸ VAW Comments, page 11.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 13.

²¹ ARWA Comments, page 5.

²² *Id.*

²³ 234 Ala. 396 (1937) (finding that the Commission does not have authority over electric membership cooperatives formed pursuant to Ala. Code Chapter 37-7).

2. Summary of comments regarding whether a nonprofit water provider that serves customers beyond its own members could claim that it is not holding itself out to serve the general public.

The ARWA comments that “it seems possible that a nonprofit water provider could potentially serve customers other than its own members without becoming a public utility.”²⁴ The ARWA contends that “an organization does not become a public utility merely because it elects to serve customers beyond its own members,” referring to *Coastal States*.²⁵ The ARWA asserts that, if limited to a certain type of customer (e.g., large industrial customers), as seen in *Coastal States*, a water provider would not be holding itself out to serve “the public at large” and thus not be a public utility subject to Commission authority.²⁶

3. Summary of comments regarding whether an exemption to regulation exists for a water provider that serves customers by passing along the costs from a wholesale provider without taking a profit.

ARWA acknowledges that a pass through of wholesale costs to customers would not in-and-of-itself exempt a water provider from Commission jurisdiction.²⁷ However, ARWA states that it is “somewhat difficult to envision a situation where a non-profit water provider would meet the test of a public utility” if it is “merely “passing along the costs from a wholesale water provider without taking a profit.”²⁸ The ARWA adds that “[i]t would likely need to be very unique situation for the Commission to conclude that such a provider is a public utility.”²⁹

²⁴ ARWA Comments, page 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ ARWA Comments, page 7.

²⁸ *Id.*

²⁹ *Id.*

and to remove the leadership of the water provider.³⁵ However, corporate governance documents that merely use the term “member” without providing such rights fall short of providing these protections. Without the right to choose and remove leadership, the term “membership” becomes meaningless, and such “members” are effectively the same as the general public. Therefore, to determine whether a water provider serves only its members or the general public, the Commission considers more than the labels (such as “cooperative” or “member”) found in a water provider’s corporate governance documents.

For water providers that represent that they only serve their own members, the Commission’s jurisdictional analysis involves two steps. First, the Commission confirms that the entity only provides water to its own members by reviewing corporate governance documents and other evidence.³⁶ Second, the Commission considers whether the entity’s corporate governance documents show that its members have the right to select and remove the leadership of the entity. If the Commission finds that a nonprofit water provider only serves its own members and provides them with these rights, then the Commission may presume that the entity does not serve the general public. However, if the Commission finds that the entity provides service to nonmembers or that its corporate governance documents merely recite the terms “cooperative” or “member” without specifying these membership rights, then further inquiry is needed to determine whether the entity is holding itself out to serve the general public.

Despite comments suggesting that the stated purpose in corporate governance documents may sufficiently support the Commission’s lack of jurisdiction,³⁷ the Commission finds that a

all entities providing such services, noting that customers did not need such protection when a utility is owned and operated by a municipality).

³⁵ For example, see the articles submitted by water providers in this proceeding.

³⁶ The provided articles mention the possibility of selling surplus water if the members needs are met; therefore, it is necessary to confirm whether a water provider is actually selling water to customers beyond its members.

³⁷ See ARWA Comments, page 3.

4. Summary of comments regarding whether a water provider that only serves customers in a single development is holding itself out to serve the general public.

ARWA asserts that if “a water provider is constituted to serve only a select type of customer (e.g. industrial customers, its own members, or residents of a particular subdivision), as opposed to the public at large, then the organization is not a public utility.”³⁰ ARWA states that the Commission has previously resolved this question.³¹

III. Analysis and Findings Regarding Legal Issues

The following paragraphs address the Commission’s analysis and findings regarding each of the above-listed legal issues.

1. Analysis and findings regarding whether a water provider that only serves its own members is providing service to the general public.

The Commission generally agrees with the above-summarized comments that water providers that only serve their own members are not public utilities subject to Commission regulation because they do not provide service “to or for the public.”³² This general rule is reflected in the court cases and Commission order cited by the commenters.³³ One underlying premise for this rule is that such members do not require the same protections as public utility customers because, as effective owners of the water system, they have legal rights unavailable to public utility customers.³⁴ Specifically, corporate governance documents may give members the right to select

³⁰ *Id.*

³¹ *Id.* (citing *Mays Bend*, 1990 WL 10091990).

³² See Ala. Code § 37-4-1.

³³ However, *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396 (1937) addressed electric cooperatives formed pursuant to what is now codified as Ala. Code Chapter 37-7 rather than mutual economic associations. Chapter 37-7 includes requirements for electric cooperatives formed pursuant to it, including requirements for membership and the setting of rates. The Court considered those requirements when deciding that such entities were not public utilities subject to the Commission’s jurisdiction. In contrast, the mutual economic associations in question here were formed pursuant to Section 10A-20-9.01 with no comparable requirements.

³⁴ Compare *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396 (1937) (recognizing that an important purpose of utility regulation is preventing unjust rates and that such regulation is not necessary for

review of the corporate governance documents only creates a presumption that may be rebutted by other evidence. If other evidence shows that an entity has failed to follow the requirements of its own corporate governance documents (such as serving customers outside its membership or not availing its members their due rights), then further review is needed to establish whether the entity is a public utility subject to regulation.

The above-described, two-step review is warranted for mutual economic associations but inapplicable to similar companies formed as cooperatives pursuant to Ala. Code Chapter 37-6.³⁸ Some of the commenters emphasized the label of “cooperative” in their corporate governance documents and suggested that mutual economic associations are equivalent to Chapter 37-6 cooperatives.³⁹ This is not the case. None of the identified entities were formed under Chapter 37-6 which explicitly exempts such entities from Commission regulation.⁴⁰ In comparison, Article 9 (the authority for formation of mutual economic associations) includes no such explicit exemption. The Chapter 37-6 cooperatives must adhere to numerous statutory requirements, including requirements related to the rights of the members.⁴¹ Article 9 does not include any similar requirements. Therefore, the mention of the terms “cooperative” or “cooperation” in Article 9 or in corporate governance documents does not transform such entities into Chapter 37-6 cooperatives or require such entities to comply with the requirements in Chapter 37-6.⁴² Further,

³⁸ Ala. Code Title 37 includes two types of cooperatives—electric cooperatives under Chapter 6 and electric membership cooperatives under Chapter 7. By statute, electric cooperatives may be formed to provide water, must follow certain requirements (including membership), and are exempt from Commission regulation. In comparison, electric membership cooperatives are formed to provide electricity and are not explicitly exempt from Commission regulation, although the Alabama Supreme Court did find that the Commission does not have authority over such entities. *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396 (1937).

³⁹ Ford’s Valley suggests that it is exempt from Commission jurisdiction pursuant to Ala. Code § 37-6-27, the code section that exempts Chapter 37-6 cooperatives. Ford’s Valley Comments, page 4.

⁴⁰ See Ala. Code § 37-6-27.

⁴¹ Chapter 37-6 requires: bylaws adopted by members (37-6-8); annual meetings of the members (37-6-9); management by a board of elected members with a process for removal by election (37-6-10); and officers elected annually by the board (37-6-11).

⁴² There is a process to convert existing corporations into Chapter 37-6 cooperatives. Ala. Code § 37-6-16.

while evidence may illustrate that a mutual economic association is not providing water service to the general public and therefore not a public utility, the basis for not regulating such a water provider would be found in caselaw (as discussed above), not through the statutory exemption in Chapter 37-6.

2. Analysis and findings regarding whether a nonprofit water provider that serves customers beyond its own members could claim that it is not holding itself out to serve the general public.

The Commission agrees with the ARWA that it is possible for a nonprofit water provider to serve customers other than its own members without becoming a public utility. For example, consistent with *Coastal States*, a nonprofit water provider could provide water to its members and to a commercial customer through a contract without holding itself out to serve the general public. However, it is also possible for a nonprofit water provider to serve nonmembers in a way that meets the definition of a “public utility” under Title 37. This determination depends on the nature of that non-member customer. For example, if a water provider serves a non-member industrial customer pursuant to a contract, like in *Coastal States*, that is not considered holding itself out to serve the general public. However, if the water provider serves nonmembers that are similar to the general public, then this likely makes that water provider a public utility.

The Commission reviews the specific facts of the water service to determine whether an entity is holding itself out to serve the general public. The Commission evaluates the non-member customers, even those with purported contractual agreements, to determine whether those customers equate to the general public. Returning to one of the underlying reasons for regulation, contract customers, like member customers, have rights not available to the general public. Presumably, a negotiated contract would include terms regarding the price of the water and a

process to resolve issues. Therefore, contract customers do not require the same protections as public utility customers. However, compelled service agreements that provide no customer rights may not prove that an entity is not providing service to the general public.

3. Analysis and findings regarding whether an exemption to regulation exists for a water provider that serves customers by passing along the costs from a wholesale provider without taking a profit.

The Commission agrees with the ARWA that such a pass through of wholesale costs to customers would not in-and-of-itself exempt a water provider from Commission jurisdiction.⁴³ But, differing from the ARWA, the Commission can envision a situation where a water provider passing on costs would meet the test of a public utility. For example, a developer may engage, or even form, an entity to provide water service to a subdivision that does not have other water options. Such an entity, whether formed as a nonprofit or for profit, may have the initial incentive to only pass through the wholesale costs of water to support the growth of the development. Such a water provider may not have member owners and may provide water to everyone in that subdivision. In this case, the water provider is holding itself out to serve the general public and, without regulation, its customers would not have rights or recourse to address rate or service issues. Further, over time, that water provider's incentives may change, such as when the developer sells all the lots or when the water system needs substantial upgrades. Without comments suggesting otherwise, the Commission finds that the passing through of wholesale costs to customers would not in-and-of-itself exempt a water provider from Commission jurisdiction.

4. Analysis and findings regarding whether a water provider that only serves customers in a single development is holding itself out to serve the general public.

⁴³ See ARWA Comments, page 7.

The Commission disagrees with ARWA's comments on this issue. The ARWA appears to lump the following water providers in the same jurisdictional status: water providers who only serve customers in a single development; water providers who only serve their own members; and water providers who also serve industrial customers via contracts.⁴⁴ As previously discussed in this order, the latter two types may support the finding that an entity is not serving the general public. However, the fact that a water provider only serves a single subdivision (assuming its customers are not also members) is not a reason in itself to find that an entity is not holding itself out to serve the general public and therefore not subject to the Commission's jurisdiction. Neither Title 37 nor the cited caselaw requires a utility to serve all of the public of Alabama. If it did, there would not be a single utility in the state. Utilities serve territories or areas, either as established by statute⁴⁵ or through time. The singular fact that a provider only serves one subdivision does not exclude it from the Commission's jurisdiction.

The Commission also disagrees with ARWA that the Commission has previously resolved this question in *Mays Bend*.⁴⁶ In 1990, the Commission initiated a proceeding to determine whether it had jurisdiction over Mays Bend Water Cooperative, Inc. ("Respondent"). The Respondent indicated that it "provides service to its members only" and that each lot owner in the subdivision is a member of the cooperative.⁴⁷ Based on those facts, the Commission found that the Respondent was not a utility providing service "to or for the public."⁴⁸ The facts in *Mays Bend* indicate that the Commission finding was based on members-only service (like the first issue in this order) and not that the Respondent served a single subdivision.

⁴⁴ ARWA Comments, page 7.

⁴⁵ See, e.g. Ala. Code Chapter 37-14.

⁴⁶ See *Id.* (citing *Mays Bend*, 1990 WL 10091990).

⁴⁷ *Mays Bend*, 1990 WL 10091990.

⁴⁸ *Id.*

IV. Formation and Organization of Identified Entities

The Commission requested the following information from the identified water service providers:

- Entity formation documents;
- Corporate governance documents;
- Description of the scope of water service (whether to members or general public);
- Description of the process to become a member, if applicable;
- Description of day-to-day operations;
- Description of the complaint process available to dissatisfied customers;
- Description of the process for members to change the leadership of the water provider, if applicable;
- Identification of status of members (whether equivalent to shareholders), if applicable; and
- Minutes from the last two years of board or member meetings.

Six water providers submitted documents along with their filed comments. The following describes those submitted documents for each water provider.

Bethel provided its declaration of incorporation, by-laws, and a description of its operations. The declaration of incorporation, dated January 11, 1972, established Bethel as a nonprofit corporation pursuant to Title 10, Section 108 (recodified as Title 10A, Section 9.01), states that “ownership shall be represented by membership certificates,” and indicates that the company shall admit members under the terms of its bylaws. Bethel’s by-laws, also dated January 11, 1972, states that members have the right to use Bethel’s water system, establishes procedures for member meetings to include election of the board, and creates standards for removal of the company’s directors or officers. The company provided notice of an annual member meeting that

included a call for filling positions on the Board of Directors. In its comments, Bethel states that each of its 1,418 water users is a member.⁴⁹

Ford's Valley provided its declaration of incorporation, by-laws, and a description of its operations. The declaration of incorporation, dated June 4, 1971, established Ford's Valley as nonprofit corporation pursuant to Title 10, Section 108 (recodified as Title 10A, Section 9.01), states that "ownership shall be represented by membership certificates," and indicates that the company shall admit members under the terms of its bylaws. Ford's Valley's by-laws, adopted August 9, 2016 and amended several times thereafter, states that members have the right to use Ford's Valley water system, establishes procedures for member meetings to include election of the board, and creates standards for removal of the company's directors or officers. The company provided notice of an annual member meeting that included a call for filling a position on the Board of Directors. Ford's Valley indicates that it "purchases and distributes water for its members."⁵⁰

McCall provided its declaration of incorporation, by-laws, and a description of its operations. The declaration of incorporation, dated January 10, 1969, established McCall as nonprofit corporation pursuant to Title 10, Section 108 (recodified as Title 10A, Section 9.01), states that "ownership shall be represented by membership certificates," and indicates that the company shall admit members under the terms of its bylaws. McCall's by-laws states that members have the right to use McCall's water system, establishes procedures for member meetings to include election of the board, and creates standards for removal of the company's directors or officers. The company provided minutes from annual member meetings that referenced

⁴⁹ Bethel Comments, page 2.

⁵⁰ Ford's Valley, page 1.

nominations to the Board of Directors. In its comments, McCall states that each of its approximately 2,770 water users is a member.⁵¹

Peterson provided its declaration of incorporation, by-laws, and a description of its operations. The declaration of incorporation, dated April 16, 1969, established Peterson as nonprofit corporation pursuant to Title 10, Section 108 (recodified as Title 10A, Section 9.01), states that “ownership shall be represented by membership certificates,” and indicates that the company shall admit members under the terms of its bylaws. Peterson’s by-laws states that members have the right to use Peterson’s water system, establishes procedures for member meetings to include election of the board, and creates standards for removal of the company’s directors or officers. The company did not provide minutes from annual member meetings but did provide minutes from regular board meetings. In its comments, VAW states that “water service is only provided by Peterson to its members.”⁵²

VAW provided its declaration of incorporation, by-laws, and a description of its operations. The declaration of incorporation, dated August 19, 1968, established VAW as nonprofit corporation pursuant to Title 10, Section 108 (recodified as Title 10A, Section 9.01), states that “ownership shall be represented by membership certificates,” and indicates that the company shall admit members under the terms of its bylaws. VAW’s by-laws states that members have the right to use VAW’s water system, establishes procedures for member meetings to include election of the board, and creates standards for removal of the company’s directors or officers. The company provided minutes from annual member meetings that referenced nominations to the Board of Directors. In its comments, VAW states that “water service is offered to members only.”⁵³

⁵¹ McCall Comments, page 2.

⁵² Peterson Comments, page 3.

⁵³ VAW Comments, page 2.

White House provided its declaration of incorporation, by-laws, and a description of its operations. The declaration of incorporation, dated November 1, 1971, established White House as nonprofit corporation pursuant to Title 10, Section 108 (recodified as Title 10A, Section 9.01), states that “ownership shall be represented by membership certificates,” and indicates that the company shall admit members under the terms of its bylaws. White House’s by-laws states that members have the right to use White House’s water system, establishes procedures for member meetings to include election of the board, and creates standards for removal of the company’s directors or officers. The company did not provide minutes from any annual member meetings. In its comments, White House represents that it conducts regular board meetings and annual meetings of general membership.”⁵⁴ The comments also state that those that desire water service must make application for membership.⁵⁵

V. Determination of Status of Identified Entities

Some of the identified water providers submitted sufficient information to allow the Commission to evaluate jurisdiction. Based on the provided documents and the above-described considerations, it appears that the following water providers only serve their own members, and their members have the right to both select and remove the leadership. Therefore, the Commission presumes that these entities are not public utilities under Alabama law and, absent any evidence to the contrary, finds that they are not subject to regulation by the Commission.

Bethel Water System, Inc.

**Ford’s Valley and Highway 278 Water
Cooperative**

McCall Water System, Inc.

Peterson Water System, Inc.

VAW Water Systems, Inc.

White House Water System

⁵⁴ White House Comments, page 2.

⁵⁵ *Id.*, page 3.

The Commission cannot determine its jurisdiction over the identified water providers that did not provide documentation or comments in this proceeding. Internal research suggests that some of these providers are public utilities subject to Commission jurisdiction.

IT IS SO ORDERED BY THE COMMISSION that a nonprofit water service provider is presumed not to be a utility providing service “to of for the public” if it meets the following two-prong test: 1) the entity shows, through corporate governance documents or other evidence, that it only provides water to its own members; and 2) its corporate governance documents show that that its members have the right to select and remove the leadership of the entity.

IT IS FURTHER ORDERED that a nonprofit water service provider that submits evidence to meet the two-prong test may later be deemed a public utility if additional evidence shows that the entity is not actually operating consistently with meeting both parts of the two-prong test.

IT IS FURTHER ORDERED that a water provider that is not a public utility at the time of this order may trigger future jurisdictional review by materially changing its corporate governance documents or operations.

IT IS FURTHER ORDERED that a nonprofit water provider that serves retail customers beyond its own members may be a utility providing service “to or for the public” if the customers served are similar in character to the general public.

IT IS FURTHER ORDERED that water rates that reflect a passing through of wholesale costs to customers would not in-and-of-itself exempt a water provider from Commission jurisdiction.

IT IS FURTHER ORDERED that only serving a single subdivision would not in-and-of-itself exempt a water provider from Commission jurisdiction.

IT IS FURTHER ORDERED that, based on provided documents and comments, the following water providers are not public utilities subject to regulation by the Commission:

Bethel Water System, Inc.

**Ford's Valley and Highway 278 Water
Cooperative**

McCall Water System, Inc.

Peterson Water System, Inc.

VAW Water Systems, Inc.

White House Water System

IT IS FURTHER ORDERED that, on or before 30 days from the effective date of this Order, each of the following water providers, which failed to submit comments or documentation during this proceeding, shall either apply for a certificate of convenience and necessity as a public utility or submit the above-described evidence that it is not a public utility subject to Commission regulation:

Blue Hole Water Company, Inc.

Freemanville Water System, Inc.

Mexia Water System, Inc.

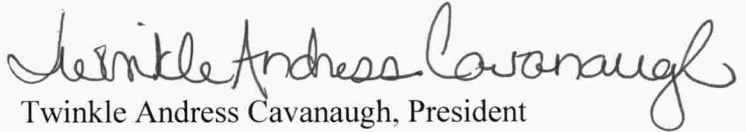
Supreme Property Management, Inc.

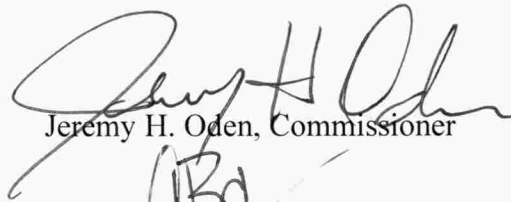
IT IS FURTHER ORDERED that jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premise.

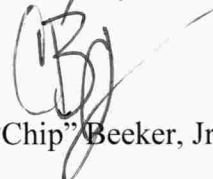
IT IS FURTHER ORDERED that this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 27th day of June 2022.

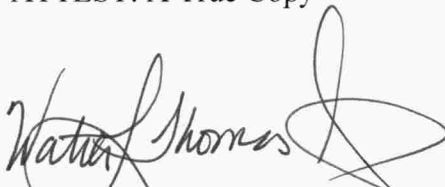
ALABAMA PUBLIC SERVICE COMMISSION


Twinkle Andress Cavanaugh, President


Jeremy H. Oden, Commissioner


Chris "Chip" Becker, Jr., Commissioner

ATTEST: A True Copy


Walter L. Thomas, Jr., Secretary